No.....

In the Supreme Court Of the United States

OCTOBER TERM, 1960

ALLIED VAN LINES, INC., a corporation,
Petitioner,

vs.

J. F. VANDENBERGH and
JEAN VANDENBERGH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

TO THE HONORABLE CHIEF JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Allied Van Lines, Inc., a corporation, respectfully prays that a Writ of Certiorari issue to review the decision of the Supreme Court of the State of Montana entered in the above cause on April 26, 1960, modifying and affirming as modified a judgment on verdict of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark, which said judgment allowed recovery to respondents in the sum of $4,450.00, with interest at 6%, and costs in the amount of $51.75, for goods lost and damaged in transit, given in an action grounded upon the common law liability of public carriers.

OPINIONS BELOW

The District Court of the State of Montana rendered

no opinion. Its judgment on verdict, dated and entered on the 29th day of November, 1957, appears at pages 13-14 of the record and is appended hereto as Appendix A-1 to A-2. The decision of the Supreme Court of Montana and its opinion are appended hereto as Appendix A-3 to A-16. Such decision and opinion is not yet officially reported but appears in Volume 351, Pac. 2d. 537.

JURISDICTION

The opinion and decision of the Supreme Court of Montana was rendered April 26, 1960 (Appendix A-3 to A-16), and the petition for rehearing, timely filed, was denied May 11, 1960 (Appendix A-17).

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257, subdivision (3).

QUESTIONS PRESENTED

1. Is an interstate shipper of household goods bound by the limitations of liability set forth in the tariff of an interstate common carrier published pursuant to the authority of the Interstate Commerce Commission?

2. Is an interstate shipper bound by the limitations of liability of a "Standard Household Goods Bill of Lading and Freight Bill" issued pursuant to the authority of the Interstate Commerce Commission when, for the convenience of the shipper, no copy of the bill of lading is personally delivered to the shipper at the time shipment is initiated.

3. Is an interstate shipper bound by his declaration of value of household goods entered upon a bill of lading in accordance with his written instructions when,

for the convenience of the shipper, no copy of the bill of lading is delivered to the shipper at the time shipment is initiated.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Federal legislation involved is embodied in Title 49, U.S.C., and particularly the "Carmack Amendment," 49 U.S.C. 20 (11) (Appendix A-18 to A-20).

49 U.S.C. 20 (11) is applicable to common carriers by motor vehicles by virtue of 49 U.S.C. 319 (Appendix A-21).

A regulation of the Interstate Commerce Commission, Code of Federal Regulations, 1949 Edition, Title 49, Transportation, Sec. 176.9 (a), Liability of Carriers, is also applicable (Appendix A-22).

STATEMENT

Petitioner is a common carrier by motor vehicle engaged in interstate commerce. (R. 2, 7).

The action by respondents was in two counts, (1) to recover for a loss of a portion of the shipment of household goods from Forest Hills, New York, to Helena, Montana (R. 2-3) and (2) to recover for damages in the shipment of a piano in a separate and independent shipment from Oakland, California, to Helena, Montana (R. 3-4). Federal questions have been raised and preserved only with respect to the shipment involved in the first count, from Forest Hills, New York, so all matters relating to the second shipment will be disregarded.

By virtue of erroneous instructions of the trial court,

a jury was permitted to give a verdict on the first count for $3,000.00 for one lost trunk and one lost carton (R. 2, 13). Since the evidence showed a loss of these items in transit, the issue is not as to whether recovery should have been permitted, but as to the extent of recovery which should have been permitted.

Arrangements for the shipment originating in Forest Hills, New York, were made between respondents, in Helena, Montana, and an agent of petitioner, in Forest Hills, New York, by correspondence (R. 19-20, 37, 50, 80, Plaintiff's Exhibit 3, Defendant's Exhibit 10).

By letter dated October 7, 1955 (Defendant's Exhibit 10), petitioner's Forest Hills agent quoted rates and advised, "Comprehensive Transit Protection is at the rate of $5.00 per declared $1000.00 valuation." By respondents' answer, dated November 1, 1955 (Plaintiff's Exhibit 3), shipment of the household goods was ordered, and a declaration of value was made by the statement, "Please insure my things with your comprehensive transit protection for $5,000.00.

Thereafter, petitioner issued its "Standard Household Goods Bill of Lading and Freight Bill" in conformity with the instructions of respondents letter of November 1, 1955, (Plaintiff's Exhibit 3) showing the declared value at $5,000.00, with other pertinent data. The uncontroverted testimony of respondents was to the effect that they received no copy of the bill of lading until the shipment was delivered to them in Helena, Montana, on or about December 1, 1955 (R. 21), at which time one of respondents signed a copy (R. 21),

but there was no evidence that the bill of lading was not in accordance with the agreement of the parties or not in accordance with applicable authority and regulations of the Interstate Commerce Commission.

The shipment consisted of some 36 or more cartons, some 7 trunks, some 5 barrels, and over 25 other articles of furnishings such as a television set, tables, chests, chairs, dressers, etc. (R. 17, 19, Plaintiff's Exhibits 1 and 2). Recovery of $3,000.00 for the one lost trunk and one lost carton, constituting a very small proportion of the entire shipment, was allowed without regard to applicable limitations on liability. Respondents testimony was that the contents of the lost containers were various items of silver, paintings, a stamp collection and other articles of extraordinary value (R. 23-29, 69-70, 75, Defendant's Exhibit 11). In spite of the declared value of $5,000.00 one of respondents admitted that the actual value of the entire shipment was $25,000.00, or more, (R. 57).

Among other things the bill of lading provided (Plaintiff's Exhibit 4, Defendant's Exhibits 9 and 15):

"SUBJECT TO THE FOLLOWING CONDITIONS:—

"1. RATES, RULES AND REGULATIONS IN ALLIED VAN TARIFF 48C Sec. 2 in effect on date hereof; . .

. . .

"3. SHIPPER DECLARES VALUE OF ENTIRE SHIPMENT to be $5,000. and RELEASES AND LIMITS VALUE AND LIABILITY as provided in Section 1 of Contract Terms ON REVERSE SIDE hereof.

"NOTICE: UNLESS A GREATER VALUE IS DECLARED, LIABILITY IS LIMITED TO

30 CENTS PER POUND OF AND FOR EACH ARTICLE LOST OR DAMAGED.

. . .

"5. ALL TERMS printed or stamped hereon or on the reverse side of the Original Bill of Lading.

"SHIPPER'S SIGNATURE:

"I hereby make foregoing declaration and release of value and agree to foregoing contract, terms and conditions.

"Signed (X) Jean Vanden Bergh

"Foregoing Shipment Received on Above Date Subject to Above Declaration Release, Terms and Conditions.

ALLIED VAN LINES, INC.

"NET WEIGHT 4,700 LBS.

. . . . .

"Declaration of Documents, Specie, Extraordinary Valued Articles.

"Declared Value Protection per $100.00 50c $25.00.

. . .

"The above described shipment was received in good condition except as noted on the Shortage and Damage Report.

"Date Delivered Dec. 1, 1955. Consignee (X) Jean Vanden Bergh."

It was admitted by the pleadings (R. 8, 11) that at all times concerned a rule of the Interstate Commerce Commission of the United States (Code of Federal Regulations, 1949 Edition, title 49, Transportation, Sec. 176.9 Liability of Carriers) was in effect (Appendix A-22).

At the times involved Tariff 48C, Supplement 12, was in force, a certified copy of which was admitted into evidence as Defendant's Exhibit 14 (R. 126). It provided as follows:

> "(a) That carrier will not assume any liability whatsoever for: Documents, currency, money, jewelry, watches, precious stones, or articles of extraordinary value including accounts, bills, deeds, evidence of debt, securities, notes, postage stamps, stamp collections, revenue stamps, letters or packets of letters, articles of peculiarly inherent value, precious metals or articles manufactured therefrom, which are not specifically listed on the bill of lading."

The applicable tariffs were published by the respondent carrier at the time of the shipment (R. 128-130).

The terms and conditions which appear on the back of the original of the "Standard Household Goods Bill of Lading and Freight Bill" (Plaintiff's Exhibit 4) include the following, which is specifically referred to on the face of all copies of the bill of lading:

> "SECTION 1. The carrier shall be liable for the actual loss or damage of or to any article (except documents, specie or articles of extraordinary value which are not specifically listed on the bill of lading) while being carried or held in storage-in-transit, arising or resulting from any external cause *other than* an act, omission or order of the shipper, owner of the goods, or a civil or military authority, *provided* that the shipper has declared in writing upon the bill of lading the full actual value of the entire shipment; *otherwise*, the liability of the carrier for loss or damage to any such article shall be released and limited:
>
> "(a) To 30 cents per pound of the weight of the lost or damaged article if the shipper has failed

to make any declaration of the value in writing upon the bill of lading; or

"(b) To a proportion of the declared value of the entire shipment, represented by the percentage which the full actual value of the lost or damaged article bears to the full actual value of the entire shipment if the value so declared by the shipper is less than the full actual value of the shipment."

The federal questions of which review is sought were raised in the court of first instance by requests for charges to the jury which were refused, and by objections to charges to the jury which were given (R. 154-155, 159, 166-167, 174-177, 179-184). The same questions were raised in the Montana Supreme Court by Specifications of Error Nos. 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, and 17, a true and correct copy of which has been certified to this Court.

Without discussing any of these Specifications of Error, the Supreme Court of Montana upheld the Court of first instance by saying (Appendix A-15):

"Based upon the foregoing discussion, there was no error in the theory of the case adopted by the trial Court in its instructions."

Since the pertinent quotations and summaries of the record relating to the federal questions sought to be reviewed are somewhat voluminous, they are included in the appendix hereto at pages A-23 to A-29.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Montana has decided a federal question affecting interstate commerce in a way that is not in accord with applicable decisions of this Court.

The sum total of the instructions of the court of first instance was to permit the respondents to recover against the carrier on the original common law principle that the carrier is an insurer, and to ignore the uncontroverted evidence and established law that the carrier's liability was limited (1) by tariffs filed with the Interstate Commerce Commission, (2) by the terms of bills of lading having the force of law, and (3) by a valid contract between the parties fixing the value of the shipment.

The verdict of the jury in the amount of $3,000.00 (R. 13) is conclusive that the instructions misled the jury, in that the amount of the recovery allowed could not have been correct under any theory of the facts and applicable federal law, as will be seen by the following:

1. One of respondents admitted that the entire shipment was worth $25,000.00 or more (R.57). Thus, if there was a declared value in writing of $5,000.00 by respondents' letter (Plaintiff's Exhibit 3), as petitioner asserts, the declaration was not "the full actual value of the entire shipment" contemplated by Section 1 of the terms on the back of the bill of lading (Plaintiff's Exhibit 4), and the measure of damages would be under Section 1 (b) of those terms. In that case the recovery could not exceed:

$$\frac{\$4{,}305 \text{ (total claimed, R. 5)}}{\$25{,}000 \text{ (total value) (R. 57)}} \text{ of } \$5{,}000$$

or $861.00.

2. If there was no declared value in writing, as contended by respondents, then the provisions of Section 1 (a) of the terms on the back of the bill of lading (Plaintiff's Exhibit 4) would apply, limiting the recovery to 30 cents per pound. The testimony of respondents was that the lost ar-

ticles did not exceed a combined weight of 160 pounds (R. 83), and under this theory the recovery could not have exceeded $48.00.

3. If tariff 48 C, Supplement 12 (Defendant's Exhibit 14) was not binding on the parties, as asserted by petitioner, the amount of recovery should either have been limited, or further limited, by first excluding articles of extraordinary value.

4. If Tariff 48 C, Supplement 12 (Defendant's Exhibit 14) was not binding on the parties, as asserted by respondents, the recovery would still have been limited by propositions 1 and 2 above.

The only alternatives to the foregoing are (1) that the bill of lading was no part of the contract of shipment, (2) that the tariff was no part of the contract of shipment, or (3) that neither the bill of lading nor tariff were part of the contract of shipment. The latter alternative was adopted both by the court of first instance and by the Supreme Court of Montana.

None of the alternatives set forth in the foregoing paragraph can be upheld under the pronouncements of this Court or under the majority views of inferior courts.

The evil of the opinion of the Supreme Court of Montana is in its dogmatic assertion, 351 Pac. 2d 541:

> "... Here there was 'no value declared in writing by the shipper or agreed upon in writing'. (346 U.S. 128, 73 S. Ct. 990) The statement in Mrs. Vandenbergh's letter regarding the comprehensive transit protection did not amount to a declaration of value..." (Appendix A-12 to A-13)

The letter referred to is Plaintiff's Exhibit 3, wherein Mrs. Vandenbergh stated:

> "Please insure my things with your Comprehensive transit protection for $5,000.00."

This letter was in answer to a letter of petitioner's agent (Defendant's Exhibit 10), which fully outlined the freight rates, and gave respondents a free and unfettered opportunity to declare any value they might choose by the following statement:

> "Comprehensive Transit Protection is at the rate of $5.00 per declared $1,000.00 valuation."

It is difficult to conceive how a carrier could better provide an opportunity to choose rates based upon declared valuation, and both the court of first instance and the Supreme Court of Montana should have recognized, as a matter of law, the essential nature of the correspondence.

The erroneous and unsupported conclusion of the Montana Supreme Court, supra, was essential to its reliance on *New York, N. H. & Hartford R. Co. v. Nothnagle et al*, 346 U. S. 128, 73 Sup. Ct. 986, 97 L. Ed. 1500 and *Caten v. Salt City Movers & Storage Co., Inc.* 149 Fed. 2d 428 (C.C. A. 2d, 1945), which the Montana Supreme Court considered controlling (Appendix A-7, A-11). In both of these cases it was undisputed that there was no declaration of value in writing.

The controlling law, to the effect that the limitations of a bill of lading and of a published tariff are binding when a shipper has the knowledge (either presumed or actual) that the rate is based upon declared value, is set forth in:

> *American Railway Express Co. v. Lindenburg*, 260 U.S. 584, 43 S. Ct. 206, 67 L. Ed. 414.
>
> *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 S. Ct. 148, 57 L. Ed. 314.
>
> *Great Northern Railway Company v. O'Connor*, 232 U.S. 508, 34 S. Ct. 380, 58 L. Ed. 703.

Glickfield v. Howard Van Lines, 213 F. 2d 723 (C.C.A. 9, June 11, 1954).

White v. Southern Ry. Co., 38 S.E. 2d 111, 208 S.C. 319, 165 A.L.R. 988 (S.C., 1946).

Jacobson v. Pennsylvania R. Co., 54 A. 2d 575.

Holmes v. National Van Lines, 350 Pac. 2d 864 (Wash., Apr. 7, 1960).

Since, as has been seen, there was a choice of rates, it is not necessary to rely upon such cases as *Galveston Ry. Co. v. Woodbury*, 254 U.S. 357, 41 S. Ct. 114, 65 L. Ed. 301, which indicate that no choice is required.

CONCLUSION

The facts of the instant case vary somewhat from those of similar cases previously considered by this Court, but the facts bring the case squarely within the principle repeatedly stated, and perhaps most succinctly expressed in *Adams Express Co. v. Croninger*, supra, 226 U.S. 491, 510, 57 L.Ed. 314, 322, that it is not "conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the rate, and then recover a larger value in case of loss."

The questions are of vital and recurring significance and of great impact upon interstate commerce. Since they were questions of first impression with the Supreme Court of Montana, that court should not be permitted to pursue a path of precedents, based upon erroneous and dogmatic conclusions, contrary to the mandate of this Court.

It is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

LLOYD J. SKEDD

Attorney for Petitioner

L. V. HARRIS,
HUBERT J. MASSMAN,
Of Counsel

APPENDIX

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA

In and for the County of Lewis and Clark.

J. F. VANDENBERGH and JEAN VANDENBERGH,

Plaintiffs

vs.

ALLIED VAN LINES, INC., a corporation

Defendant

JUDGMENT ON VERDICT.

This action came on regularly for trial on the 25th day of November, 1957, Ralph J. Anderson and Stanley P. Sorenson Esq., appearing as Counsel for Plaintiff, and Skedd, Harris & Massman Esq., for the Defendant. A Jury of twelve persons were regularly empaneled and sworn to try said Action, whereupon witnesses on the part of Plaintiffs and Defendant were duly sworn and examined. After hearing the evidence, the arguments of Counsel and the instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called, answered to their names, and say they find a verdict for the Plaintiffs.

Wherefore, By virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that J. F. Vandenbergh and Jean Vandenbergh do have and recover of and from Allied Van Lines, Inc., a corporation the sum of Four Thousand Four Hundred Fifty ($4,450.00) Dollars, with interest thereon at the

rate of six per cent, per annum from the date hereof till paid, together with said plaintiffs' costs and disbursements incurred in this action, amounting to the sum of Fifty-one and 75/100 ($51.75) Dollars.

Judgment rendered November 29, 1957.

LESTER H. LOBLE, Judge

A-3

No. 9963

STATE OF MONTANA

In the Supreme Court, March Term, 1960

J. F. VANDENBERGH and JEAN VANDENBERGH,

Plaintiffs and Respondents,

vs.

ALLIED VAN LINES, INC., a Corporation,

Defendant and Appellant.

L. V. Harris, Esq., Helena, Montana, argued orally for Appellant.

Ralph J. Anderson, Esq., Helena, Montana, argued orally for Respondents.

Submitted: March 3, 1960.

Decided: April 26, 1960

Filed: April 26, 1960

THOMAS J. KEARNEY, Clerk

Mr. Justice Castles delivered the Opinion of the Court.

This is an appeal from a judgment entered on a jury verdict in favor of plaintiffs. The complaint states two causes of action based upon two separate shipments by the defendant. The first cause of action is to recover the value of certain personal property which was lost in transit between Forest Hills, New York and Helena, Montana. The second cause of action is to recover damages for the impairment of a piano which was being transported from Oakland, California, to Helena. The jury found for plaintiffs on both causes of action and assessed damages at $3,000 on the first

cause of action and $1,450 on the second cause of action.

Pursuant to preliminary phone calls, Muller Bros. Inc., which is admitted by the answer to be an agent of Allied Van Lines in Forest Hills, New York, wrote Mrs. Vandenbergh on October 7, 1955, as follows:

"We are pleased to submit the following estimate on the removal of your household goods:

To ship approx. 2,500 lbs. 2,331 miles at

$16.25 cwt $442.50

Federal Trans. Tax 3% 12.68

Comprehensive Transit Protection is at the rate of $5.00 *per declared* $1,000.00 *valuation.*" Emphasis supplied.

On November 1, 1955, Mrs. Vandenbergh answered the above letter stating in part, "Please insure my things with your comprehensive transit protection for $5,000.00."

The goods which had formerly been in storage at Muller Bros. Inc. warehouse were shipped from Forest Hills and when they were unloaded in Helena one trunk and one carton were missing. The items contained in the trunk and carton were largely items of unusual value such as sterling silver, original oil paintings and a valuable stamp collection. Mrs. Vandenbergh testified that Muller Bros., Inc. had instructed her on how to pack these items, and assured her that they would be safely kept while in storage.

At all times mentioned herein, defendant's Tariff No. 48c was in force. Rule 12 of this tariff provides as follows: "The carrier will not assume any liability whatsoever for: Documents, currency, money, jewelry,

watches, precious stones, or articles of extraordinary value including accounts, bills, deeds, evidence of debt, securities, notes, postage stamps, stamp collections, revenue stamps, letters or packets of letters, articles of peculiarly inherent value, precious metals or articles manufactured therefrom, which are not specifically listed on the bill of lading."

The bill of lading provided that "The carrier shall be liable for the actual loss or damage of or to any article (except documents, specie or article of extraordinary value which are not specifically listed on the bill of lading) while being carried or held in storage-in-transit, arising or resulting from any external cause *other than* an act, omission or order of the shipper, owner of the goods, or a civil or military authority, *provided* that the shipper has declared in writing upon the bill of lading the full actual value of the entire shipment; *otherwise*, the liability of the carrier for loss or damage to any such article shall be released and limited. * * *

"(b) To a proportion of the declared value of the entire shipment, represented by the percentage which the full actual value of the lost or damaged article bears to the full actual value of the entire shipment if the value so declared by the shipper is less than the full actual value of the shipment."

The record clearly shows that the bill of lading was not received by the shippers, Mr. and Mrs. Vandenbergh, until the shipment was received in Helena. Plaintiffs predicate their case upon this fact and allege, in effect, that because of this failure the defendant is li-

able for the full amount of damage based upon the common-law liability of common carriers.

The defendant's answer sets up an affirmative defense in which it relies upon the following Interstate Commerce Commission regulation: "Liability restricted. Common carriers by motor vehicle of household goods shall not assume any liability in excess of that for which they are legally liable under their lawful bills of lading and published tariffs." Ex Parte No. MC-19, Practices of Motor Common Carriers of Household Goods, 47 M.C.C. 119, Rule 9 (a); Code of Federal Regulations, 1949 Ed., Title 49, Transportation, § 176.9.

Defendant's theory is that because of this regulation, plaintiffs were bound by the limitations of the bill of lading and the further limitation of Tariff 48c, Rule 12. This proposition is urged in spite of the fact that no bill of lading was furnished to plaintiffs when the goods were shipped, nor was there any attempt made to furnish a bill at any time prior to the arrival of the goods in Helena.

The main question for our decision is whether the above proposition is a correct statement of the law. Today, it is elementary that questions relating to the limited liability of interstate common carriers are governed by Federal law. Boston and Main R. v. Hooker, 233 U.S. 97, 34 Sup. Ct. 526, 58 L.Ed. 868, L.R.A. 1915B 450, Ann. Cas. 1915D 593; Sayles v. Interstate Busses Corp., 66 N.Y.S. 2d 377, 187 Misc. 286; New York, N.H. & H. R. Co. v. Nothnagle, 346 U.S. 128, 73 Sup. Ct. 986, 97 L.Ed. 1500; Cray v. Pennsylvania

Greyhound Lines, Inc., 177 Pa. Super. 275, 110 A.2d 892.

In Caten v. Salt City Movers & Storage Co., (2 Cir. 1945) 149 F.2d 428, 431, the court had before it a case which was in many respects similar to the case now before this court. The facts, briefly stated, were as follows: Plaintiff wrote defendant requesting the approximate cost to ship some household goods. Defendant replied stating an estimate of the weight and the cost figured on that basis. Subsequently the goods were loaded and weighed and plaintiff was advised by phone that the goods weighed 4,650 pounds, was asked what value to put on the goods and was told he was allowed 30c per pound under the government bill of lading. Plaintiff advised defendant that he carried $3,000 in insurance on the shipment and he was given a price for an additional $2,000 in insurance which the plaintiff requested that the defendant procure. There was no declaration of value other than this and no bill of lading was issued. A bill of lading was made out based upon the valuation at 30c per pound but this bill was with the shipment and was destroyed when the van burned up.

We feel justified in quoting from this decision at length due to the similar fact situation and also due to the extensive analysis of the Federal law on this subject.

"Section 20 (11) of the Interstate Commerce Act, 49 U.S.C.A. § 20 (11), applies to the defendant by virtue of § 219 of that statute, 49 U.S.C.A. § 319. It provides, insofar as here pertinent, as follows:

"'Any common carrier * * * subject to the provisions of this chapter receiving property for transportation from a point in one State * * * to a point in another state * * * shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it * * * and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier * * * from the liability hereby imposed; and any such common carrier * * * shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it * * * notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: * * * Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply * * * to property * * * received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon

the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this chapter; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon.'

"After passage of the Carmack Amendment in 1906, 34 Stat. 593, both interstate carriers and shippers were chargeable with knowledge of the content of the schedules filed with the Interstate Commerce Commission and were conclusively presumed to have contracted according to them in respect to rates and liability unless there was proof of rebating or false billing. Atchison, Topeka & Santa Fe R. Co. v. Robinson, 233 U.S. 173, 34 Sup. Ct. 556, 58 L.Ed. 901; Great Northern R. Co. v. O'Connor, 232 U.S. 508, 34 Sup. Ct. 380, 58 L.Ed. 703; Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 35 Sup.Ct. 494, 59 L.Ed. 853, L.R.A. 1915E, 665. Where no bill of lading was issued the terms of the uniform bill of lading controlled. New York Central R. Co. v. Lazarus, 2 Cir., 278 F. 900.

"But after the first Cummins Amendment, adopted in 1915, no interstate common carrier could lawfully contract for any limited liability whatever unless the goods shipped were 'hidden from view by wrapping, boxing, or other means, and the carrier [was] not no-

tified as to the character of the goods.' In that event, however, the carrier could 'require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated.' 38 Stat. 1196. The privilege of limiting its liability by contract was thus closely circumscribed and valuation in writing by the shipper was made a condition precedent to the carrier's right to make limitation agreements at all. Otherwise the carrier, required by the statute to issue a receipt or bill of lading for the goods, was made liable for the full value of the goods whether or not it had issued a receipt or bill of lading notwithstanding any representation or contract that the goods were of a lesser value.

"The second Cummins Amendment, adopted in 1916, 39 Stat. 441, made further changes which are reflected in the above quotation from § 20(11) of the Act. It was made obligatory upon every initial common carrier accepting property for interstate shipment to issue a receipt or bill of lading therefor and liability was imposed upon it for the full actual loss or damage to the property sustained during carriage by it or by a connecting carrier under a through bill of lading. So as the law now stands the only limitation of liability permitted is conditioned upon a compliance with the proviso of which the material part has already been quoted. Any attempt to limit liability is prohibited except upon a declaration of value by the shipper in writing or upon a released value agreed to in writing. Although action in writing by the shipper is plainly required, his signature is not necessary but it does furnish good evidence that he did declare or agree in writing. Receipt

of the writing by the shipper and his action upon it are adequate proof that he has assented to its terms and has made it the written agreement of the shipper and carrier. American Railway Express Co. v. Lindenburg, 260 U.S. 584, 43 Sup. Ct. 206, 67 L.Ed. 414. Compare, Girard Insurance & Trust Co. v. Cooper, 162 U.S. 529, 16 Sup. Ct. 879, 40 L.Ed. 1062."

The court in the Caten case concluded that "To permit a carrier, without any action whatever by the shipper in respect to valuation in writing, to limit its liability on the basis of declared or released value on which the rate was charged would be to ignore entirely the statutory requirement that the shipper must make the declaration or agreement in writing, and nullify that part of the proviso."

While there is an abundant body of law on this subject, in our opinion, the instant case is controlled by a 1953 decision of the Supreme Court of the United States. New York, N.H. & H.R. Co. v. Nothnagle, 346 U.S. 128, 73 Sup.Ct. 986, 97 L.Ed. 1500, was a case in which a passenger traveling interstate lost her baggage while it was entrusted to a "redcap" during a temporary stopover. The passenger had received no receipt for the baggage and was not notified of the limited liability of the railroad for baggage entrusted to a "redcap" which was filed by the railroad as a tariff. The value of the lost baggage exceeded the amount which the railroad allowed "redcaps" to handle. The Supreme Court held that the railroad was liable for the full value of the baggage, stating the proposition as follows:

"But the facts here do not bring the case within the

statutory conditions. There was no 'value declared in writing by the shipper or agreed upon writing'; in fact, not even a baggage check reciting a limitation provision changed hands. Moreover, the actual value of respondent's baggage exceeded $500; the tariff itself deems such highly valued property unacceptable for handling by redcaps. *But only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained.* [Citing cases.] *Binding respondent by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice; such an arrangement would amount to a forbidden attempt to exonerate a carrier from the consequences of its own negligent acts.*" Emphasis added.

A similar statement is found in Mickey Finn Clothes, Inc., v. Yale Transport Corp., 23 N.Y.S. 2d 84, 175 Misc. 242, where the court said:

"Even apart from the statutory requirements, a limitation of liability claimed by a carrier cannot be effective unless it is set forth in the bill of lading which constitutes the contract between the shipper and the carrier. The limitation of liability must be brought home to the attention of the shipper [Citing cases.], and a choice given to the shipper to contract with or without the limitation of liability in the movement of goods. [Citing cases.]"

The instant case falls within the rules enunciated by the opinions from which we have quoted, principally New York, N.H. & H.R. Co. v. Nothnagle, supra. Here

there was no "value declared in writing by the shipper or agreed upon in writing." The statement in Mrs. Vandenbergh's letter regarding the comprehensive transit protection did not amount to a declaration of value. Mrs. Vandenbergh was not given the choice of two rates, did not declare or release the value of the shipment, and did not consent to the terms of the bill of lading which was, in fact, not received by her until the goods arrived in Helena. The absence of these factors prevents the defendant from asserting the limited liability found in its filed tariffs and bill of lading.

Defendant argues that the filed tariffs should apply and govern the transaction in spite of the fact that no bill of lading was delivered. Admittedly there are cases which subscribe to this view. See White v. Southern Ry. Co., 208 S.C. 319, 38 S.E. 2d 111, 165 A.L.R. 988. Another theory is that in the absence of a bill of lading the provisions of the uniform bill of lading, filed as a tariff should apply. See Atlantic Coast Line R. Co. v. Clinchfield Fuel Co., 94 F.Supp. 992 (W.D.S.C. 1951). These lines of authority when applied to the facts of this case seem patently unsound. The rules are apparently based upon the principle of estoppel. See Sayles v. Interstate Busses Corp., 66 N.Y.S. 2d 377, 187 Misc. 286. The difficulty arises when an estoppel is raised against a shipper who is not versed in commercial transactions. The ordinary shipper of household goods, such as the plaintiffs in this case, should not be held to a representation implied from their silence, when they were given no real opportunity to make a representation. In the Nothnagle case, counsel for the Interstate Commerce Commission

appearing as amicus curiae argued that where no baggage check or receipt is issued implied knowledge of the carrier's regulations providing for limited liability cannot be imputed to the passenger. This view was apparently adopted by the Supreme Court when it said, "Binding respondent by a limitation which she had no reasonable opportunity to discover would effectively deprive her of the requisite choice."

Mrs. Vandenbergh made no representation as to the value of the goods because she was given no "fair opportunity" to make one. She was not given the choice which the most recent opinion of the Supreme Court of the United States says, in effect, is a condition precedent to creating the carrier's limited liability.

Similarly plaintiffs are not bound by the failure to list the items of extraordinary value on the bill of lading. There was no opportunity to list them. Failing to grant plaintiffs this opportunity prevents the defendant from setting up the limitation found in its bill of lading and filed tariffs. In this regard our view is strengthened by the undisputed testimony pertaining to Muller Brother's knowledge of the valuable items, and its failure to request that they be listed or give plaintiffs an opportunity to list them after the items had been stored.

Defendant argues that in view of the fact that plaintiffs introduced the bill of lading into evidence they should be bound by its terms, even though it formed no part of the first cause of action stated in the complaint. The apparent reason for introducing the bill was to elicit testimony regarding the shortage notations on the bill and the fact that the bill not not recevied until

the goods arrived in Helena. Under these circumstances plaintiffs are not bound by the terms of the bill of lading.

Based upon the foregoing discusison, there was no error in the theory of the case adopted by the trial court in its instructions.

Defendant's last specification of error concerning the first cause of action goes to the admissibility of a 1957 silver price list when the silver was lost in 1955. Testimony was introduced which showed that the price of silver had gone up 17 percent in this two-year period. The introduction of such testimony regarding damages is largely within the discretion of the trial court. See 15 Am. Jur., Damages, § 349. In addition to this authority, the testimony regarding the increase in the price of silver was undisputed. There was no error in admitting this price list.

As to the second cause of action, appellant's complain that there was no competent testimony with respect to the monetary extent of the damages to the piano. The appellant relies on an objection on direct examination that certain estimates of cost of repairs were hearsay. It would unduly lengthen this opinion to relate all of the evidentiary matters concerned with the damage to the piano, but we have examined the record and find much competent evidence, some of it produced by the appellant's examination. As to this specification of error, we find no merit.

Next, the appellants specify as error the refusal of the district court to retax certain items of cost. The respondents included in their cost bill two items for

copies of depositions taken by appellant. The amount was $40. The depositions of the plaintiffs were taken by defendant and by R.C.M. 1947, § 93-1801-10, were required to be filed with the clerk of court. Apparently for their own convenience in trial preparation, the plaintiffs' counsel ordered copies and sought payment as a cost.

In Isman v. Altenbrand, 42 Mont. 188, 111 P. 849, this court held that, "The cost of taking a party's deposition in his own behalf is, however, not properly taxable against his adversary. In George v. Starrett, 40 N.H. 135, it was held that where a party testifies in his own behalf, in court or by deposition, he shall not be entitled to fees as a witness."

We hold then that the cost of copies of the depositions was not a proper item of cost.

For the foregoing reasons, the judgment is affirmed as modified by the striking of the two aforementioned cost items totaling $40.

WESLEY CASTLES
Associate Justice

We concur:

JAMES T. HARRISON
Chief Justice

HUGH ADAIR
ALBERT H. ANGSTMAN
Associate Justices

ERNEST E. FENTON
District Judge Ernest E. Fenton, sitting in place of Mr. Justice Bottomly.

No. 9963

IN THE SUPREME COURT OF THE STATE OF MONTANA

J. F. VANDENBERGH and
JEAN VANDENBERGH,
Plaintiffs and Respondents.

vs.

ALLIED VAN LINES, INC., a Corporation,
Defendant and Appellant.

ORDER

Appellant's petition for rehearing is denied.
DONE this 11th day of May 1960.

JAMES T. HARRISON
Chief Justice

ALBERT H. ANGSTMAN
Associate Justices

WESLEY CASTLES
District Judge Ernest E. Fenton, sitting in place of Mr. Justice Bottomly.

CARMACK AMENDMENT 49 U. S. C. 20

"§ 20, par. (11). *Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim.* Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one state or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of

lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void. . . . *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply . . . to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as

relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. . ."

Title 49 U.S.C. 319. Application of section 20 (11) and (12) of this title to common carriers by motor vehicle.

"The provisions of section 20 (11) and (12) of this title, together with such other provisions of chapter 1 of this title (including penalties) as may be necessary for the enforcement of such provisions, shall apply with respect to common carriers by motor vehicle with like force and effect as in the case of those persons to which such provisions are specifically applicable. Feb. 4, 1887, c. 104, Part II, §219, as added Aug. 9, 1935, c. 498, 49 Stat. 563, and amended May 16, 1942, c. 318, § 3, 56 Stat. 300; Aug. 7, 1942, c. 552, § 1, 56 Stat. 746."

United States Code of Federal Regulations, 1949 Edition, Title 49, Transportation, Sec. 176.9 (a), Liability of Carriers:

> "(a) Liability restricted. Common carriers by motor vehicle of household goods shall not assume any liability in excess of that for which they are legally liable under their lawful bills of lading and published tariffs."

RECORD OF FEDERAL QUESTIONS RAISED

Specification of Error 4. Petitioner objected, in the court of first instance (R. 154-155), that the court's instruction No. 1 failed to consider limitations of liability under the tariff, bill of lading and regulations of the Interstate Commerce Commission. The error of that court in overruling the objection was preserved on appeal to the Montana Supreme Court by Specification of Error 4. The instruction was objectionable in being silent on limited liability and in including the following (R. 155):

> ". . . If you find for the plaintiffs . . . you must fix the plaintiffs' damages in such sum as you shall determine from a preponderance of all of the evidence and based upon the law as contained in these instructions will compensate plaintiffs for loss of their goods. . ."

Specification of Error 5. Petitioner objected in the court of first instance (R. 158-159), that the court's instruction No. 17 failed to take into account limitations under the tariffs, bills of lading and regulations of the Interstate Commerce Commission. The error of that court in overruling the objection was preserved on appeal to the Montana Supreme Court by Specification of Error 5. The instruction was objectionable in being silent on limited liability and in setting the outside limit for recovery in the sum of $4,305.00, the amount prayed for in the complaint, as amended.

Specification of Error 7. Petitioner objected, in the court of first instance (R. 166-167) that the court's instruction No. 16 was an incomplete statement of 49 U.S.C. 20 (11), that it ignored the uncontroverted evidence of a declaration of value in writing, and that it

ignored the binding effect of the bill of lading limiting recovery to 30c per lb. if it be assumed (as the jury was permitted to do) that there was no declaration of value in writing. The error of that court in overruling the objection was preserved on appeal to the Montana Supreme Court by Specification of Error 7. The instruction was objectionable in that it incompletely paraphrased 49 U.S.C. 20 (11) without any adaptation to the uncontroverted evidence bearing on limited liability.

Specification of Error 8. Petitioner objected, in the court of first instance (R. 174-175), that the court's instruction No. 5 ignored the binding effect of the bill of lading under the uncontroverted evidence and permitted the jury to ignore the bill of lading. The error of that court in overruling the objection was preserved on appeal to the Montana Supreme Court by Specification of Error 8. The instruction was as follows (R. 174-175):

> "You are instructed that a bill of lading is a contract, but that before you can determine that plaintiffs are bound by its terms you must first be convinced by a preponderance of the evidence that the plaintiffs agreed to its terms.
>
> "Should you determine that the plaintiffs did not agree to its terms, the plaintiffs are entitled to recover damages for the reasonable value of the property, if any, lost by them in transit.
>
> "Should you determine that the plaintiffs agreed to the terms of the bill of lading, plaintiffs are entitled to recover damages for the property, if any, lost by them in transit upon the following formula, to-wit: A proportion of the declared value of the entire shipment represented by the percentage which the full, actual value of the lost or

damaged articles bears to the full, actual value of the entire shipment.

"Should you determine from a preponderance of the evidence that the plaintiffs agreed to the terms of the bill of lading and that the plaintiffs did not declare the value of the shipment in writing, plaintiffs are entitled to recover damages for the property, if any, lost by them in transit upon the following formula, to-wit: At thirty cents ($0.30) per pound of the weight of the lost articles."

Specification of Error 9. Petitioner objected, in the court of first instance (R. 176-177), that the court's instruction No. 3 allowed the jury to ignore the terms of the applicable tariff in permitting recovery for items of extraordinary value not listed on the bill of lading, and allowed the jury to consider matters remote and unrelated which were in the nature of an estoppel and beyond the scope of the issues framed by the pleadings. The error of that court in overruling the objection was preserved on appeal to the Montana Supreme Court by Specification of Error 9. The instruction was as follows (R. 177):

"You are instructed that it is admitted that Muller Brothers, Incorporated, were the agents of the principal, Allied Van Lines, Incorporated, the defendant at the time herein involved. A principal is bound by the acts of its agent and knowledge of the agent is knowledge of the principal.

"If you believe from a preponderance of the evidence that Muller Brothers, Incorporated, knew the nature and valuation of the commodities shipped, and that the nature and value of the commodities was not listed in the bill of lading, is not a defense to the recovery by the plaintiffs of the reasonable value of the property, if any, by them lost in transit, unless you find from a preponderance of the evidence that failure to so list the na-

ture and valuation of the commodities on the bill of lading was due to some act of the plaintiffs."

Specification of Error 10. Petitioner's request for the following instruction (R. 179), in the court of first instance was refused, and the error of that court was preserved on appeal to the Montana Supreme Court by Specification of Error 10:

> "A bill of lading is a receipt and contract for carriage. A common carrier, such as the defendant in this action. is required by law to issue a receipt or bill of lading if it receives property for transportation from one state to another, and for such a receipt or bill of lading to constitute a contract for carriage between the shipper and the carrier, it is not required that the shipper sign the receipt or bill of lading."

Specification of Error 11. Petitioner's request for the following instruction (R. 179-180), in the court of first instance was refused, and the error of that court was preserved on appeal to the Montana Supreme Court by Specification of Error 11:

> "It is admitted by the pleadings that common carriers by motor vehicles of household goods, such as the defendant, shall not assume any liability in excess of that for which they are legally liable under their lawful bills of lading and published tariffs.
>
> "If you find that any shipment involved in this action was made under and pursuant to a lawful bill of lading and a lawful tariff published by defendant, then you must find that the liability of defendant, if any, is not in excess of that prescribed in such bill of lading and tariff."

Specification of Error 12. Petitioner's request for the following instruction (R. 180-181), in the court of first instance was refused, and the error of that

court was preserved on appeal to the Montana Supreme Court by Specification of Error 12:

> "You are instructed that Tariff No. 48c and Supplement No. 12 thereto were duly filed with the Interstate Commerce Commisison of the United States of America and published, and in effect at the time of the shipment concerned in plaintiffs' first cause of action, thus you cannot find against defendant in any amount on account of any money, postage stamps, stamp collections, articles of peculiarly inherent value, precious metals or articles manufactured therefrom, which you might find to have been lost or damaged."

Specification of Error 13. Petitioner's request for the following Instruction (R. 181), in the court of first instance, was refused, and the error of that court was preserved on appeal to the Montana Supreme Court by Specification of Error 13:

> "Verbal statements of an agent of a carrier cannot be construed as a waiver on the part of the carrier of any provisions of a lawful tariff then in force."

Specification of Error 14. Petitioner's request for the following instruction (R. 181), in the court of first instance, was refused, and the error of that court was preserved on appeal to the Montana Supreme Court by Specification of Error 14:

> "The Evidence shows that no particular articles were specifically listed on the bill of lading involved in plaintiffs' first cause of action. Therefore, you cannot find against defendant in any amount on account of any money, jewelry, or articles of extraordinary value including postage stamps, stamp collections, articles of peculiarly inherent value, precious metals or articles manufactured therefrom, which you might find to have been lost or damaged."

Specification of Error 15. Petitioner's request for the following instruction (R. 182), in the court of first instance, was refused, and the error of that court was preserved on appeal to the Montana Supreme Court by Specification of Error 15:

> "With respect to plaintiffs' first cause of action, if you find that plaintiffs, or either of them, had an opportunity to select a rate of payment for carriage and made a declaration of the value of the shipment with a view to obtaining a reduced rate, then any liability of the defendant for any loss or damage shall be limited to a proportion of the declared value of the entire shipment, represented by the percentage which the full actual value of the lost or damaged article bears to the full actual value of the entire shipment."

Specification of Error 16. Petitioner's request for the following instruction (R. 183), in the court of first instance, was refused, and the error of that court was preserved on appeal to the Montana Supreme Court by Specification of Error 16:

> "If you find that the plaintiffs did not make a declaration in writing of the value of the shipment from Forest Hills, Long Island, New York to Helena, Montana, and you find any goods were lost, then you must assess the damages against the defendant for any goods lost in said shipment at thirty cents ($0.30) per pound of the weight of the lost articles."

Specification of Error 17. Petitioner objected in the court of first instance (R. 183-184), that the court's instruction No. 7 ignored the presumption of law applicable to a duly published tariff, the rules of the Interstate Commerce Commission and the applicable bill of lading. The error of that court in overruling the objection was preserved on appeal to the Montana Su-

preme Court by Specification of Error 17. The instruction was as follows (R. 184):

> "You are instructed that payment of the shipping charges by the plaintiffs after the loss had occurred does not preclude the plaintiffs from recovery of damages for the loss of their property, if any, in transit, unless you believe from a preponderance of the evidence that the plaintiffs, in making such payment intended to waive any claim for damages."